SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 25 1965
JOHN F. DAVIS, CLERK

No. 287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

MEDO CALZAVARA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE F. CALLAGHAN
105 W. Adams Street
Chicago, Illinois 60603
Attorney for Petitioner

JULIUS LUCIUS ECHELES and
MELVIN B. LEWIS
30 N. La Salle St.
Chicago, Illinois
Of Counsel

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LAkeview 5-6581

INDEX

	PAGE
Opinion from the Court below	2
Jurisdictional Statement	2
Questions presented for review	3
Statutes involved	4
Statement of the case	5
Reasons relied on for allowance of writ	13
I. The misuse of the grand jury and the wrongful reception of evidence	13
II. The exclusion of petitioner's testimony	18
III. The separation of the jury	19
Conclusion	21
Appendices:	
Appendix A—Opinion of the Court of Appeals	App. 1
Appendix B—Denial of petition for rehearing	App. 9
Appendix C—Trial court opinion, U. S. v. DeGrazia et al.	App.10
Appendix D—Statutes involved	App. 17

LIST OF AUTHORITIES CITED

Johnson v. U. S., 344 F.2d 163, 164-165	16
Jones v. U. S., 342 F.2d 863, 868, 873	16, 17
Lawn v. U. S., 355 U.S. 339, 348-350	15, 17
United States v. Carrier, 344 F.2d 42, 46	19
United States v. D'Antonio, 342 F.2d 667	19
United States v. Di Grazia, 213 F. Supp. 232	13, 14
Walder v. United States, 347 U.S. 62, 65	16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO.

MEDO CALZAVARA,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Medo Calzavara, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit entered on April 29, 1965.

JUDGMENT AND OPINION OF THE COURT BELOW

On April 29, 1965, the United States Court of Appeals for the Seventh Circuit affirmed a judgment of conviction entered in the United States District Court for the Northern District of Illinois, Eastern Division, sentencing petitioner to concurrent terms of ten and five years imprisonment.

No opinion was rendered by the District Court incident to the entry of the judgment of conviction. However, an earlier related opinion relevant to the consideration of this petition appears at 215 Fed. Supp. 232, sub. nom. *U. S. v. DiGrazia*, and is reprinted as Appendix C hereto.

The Opinion of the Court of Appeals has not as yet been reported, but is reprinted herewith as Appendix A.

JURISDICTIONAL STATEMENT

On a jury trial, petitioner and others were convicted of unlawful interstate transportation of stolen merchandise, and of conspiracy so to do, in violation of Sections 2314 and 371, Title 18, United States Code.

On appeal to the United States Court of Appeals for the Seventh Circuit, the conviction was affirmed by an opinion filed April 29, 1965.

A petition for rehearing was timely filed and denied on May 27, 1965.

The jurisdiction of this Court is invoked under the provisions of Title 28 United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Where the rights of a criminal defendant have concededly been violated prior to trial by calling him as a witness before the grand jury and, without affording him assistance of counsel, the government obtained information and evidence from him in the course thereof without any admonition concerning his rights, then,

   A. May the evidence thus obtained be used against him for any purpose at his trial?

   B. If the indictment against him is quashed by reason of said invasion of his rights, may a new indictment be returned against him under the circumstances?

2. Where a defendant moves to suppress evidence on the grounds that it was unlawfully obtained through misuse of the grand jury, and where the testimony of the government officers resisting said petition demonstrates that the evidence was obtained by a promise of lenity to the defendant rather than by misuse of the grand jury, then, is the defendant precluded from relying upon the promise of lenity as grounds for the suppression?

3. Where a criminal defendant claims that his acts were performed under compulsion, can his testimony concerning such compulsion be excluded on the grounds that he is unable to identify the persons responsible for the threats against him?

4. May a jury be separated to return home in the midst of its verdict deliberations, and then return to complete its deliberations, over the objection of the defendant in a criminal case?

5. Where a decision of the Court of Appeals is predicated upon the converse of the facts shown of record, so that on a determinative point it is recited that a defendant agreed to a procedure when in fact he unequivocally objected, has said defendant thereby been denied due process of law by the reviewing court?

STATUTES INVOLVED

The relevant portions of the Statutes claimed to have been violated, are set forth within Appendix "D". The Statutes are:

A. Title 18 U.S. Code, Sec. 371.

B. Title 18 U.S. Code, Sec. 2314.

STATEMENT OF THE CASE.

Petitioner Medo Calzavara (hereinafter called defendant) was indicted in the Northern District of Illinois, Eastern Division in No. 63 CR 288 with co-defendants Anthony Francis Daddino, John J. Torello, and Peter DiFronzo, and charged with transporting goods in interstate commerce, knowing the same to have been stolen in violation of Section 2314 Title 18, United States Code, and for conspiracy to commit the act (A. 1-2).

After a jury finding of guilty, the court sentenced the defendant to a term of ten years on count 1 and five years on count 2, the sentences to run concurrent (A. 10). Motions for judgment of acquittal, in arrest of judgment and for a new trial were all denied (A. 10).

In a previous indictment returned in the Eastern District of Wisconsin in Milwaukee and transferred to the Northern District of Illinois on motion of some of the defendants and docketed in the Northern District of Illinois as No. 62 CR 16, the defendant was indicted with co-defendants Philip Joseph DiGrazia, Peter James Gushi, Anthony Francis Daddino, John J. Torello, Rose Calzavara and Peter DiFronzo. The allegations in 62 CR 16 were the same as that in 63 CR 288 from which conviction the defendant appeals. On Calzavara's motion to quash the indictment in 62 CR 16, the trial court held hearings; after which the trial court concluded that the defendant Calzavara had been called to testify as a witness in the Grand Jury proceedings in Milwaukee while he was a putative defendant without his being advised that evidence he gave might be used against him, and without his being advised of his right to have an attorney. The trial judge dismissed the

indictment No. 62 CR 16 as to both the instant defendant and his wife Rose Calzavara. *United States* v. *DiGrazia*, 213 F. Supp. 232.

Defendant's motion to suppress certain evidence as to him (A. 23), which evidence consisted of stolen merchandise found on his brother's farm where defendant took FBI agents after he was subpoenaed before the Milwaukee federal Grand Jury and after he was promised leniency, was denied (A. 29).

The Evidence for the Government

Unidentified robbers held up the night watchman and a maintenance man at the Certified Grocers Company in Forestview, Illinois and stole certain trailers containing cigarettes, razor blades and hosiery. The watchman, one Louis Kalousek, testified the robbers told him to be careful and not say anything, to keep his mouth shut (A. 14). The maintenance man, Hugh Norvell, testified that one of the robbers threatened him and told him not to remember anything (A. 14). The robbery occurred on April 29, 1961 at about 7:00 P.M. (A. 14).

FBI agents testified that commencing at 5:50 A.M. on April 30, 1961 (A. 14), they saw trailers pull into the Calzavara farm off Route 120 near Grayslake, Illinois. From that time until the early morning of May 2, 1961, automobiles and trucks were going in and out of the Calzavara property (A. 14-39). Some of the stolen property was found to have made its way into Wisconsin (A. 33); some of the property was taken back into the Chicago area (A. 37).

Evidence for Calzavara

Defendant Calzavara testified he lived in Grayslake, Illinois with his wife and ten year old son and went as far as the third grade. He then worked around horses for ten years and started a riding academy and then went into the farm and rodeo business in Libertyville, Illinois. He put on rodeos for county fairs (A. 43-44). He purchased the Grayslake Farm in 1958 and continued in the rodeo business; but in off seasons he hauled Christmas trees, hay and cattle in his trucks (A. 44). At the time of the indictment he maintained 125 to 130 head of stock including bulls, horses, steers and roping calves (A. 44).

He testified that on Sunday morning, April 30, 1961, he received a telephone call from a man who said he was a friend of Pete's (A. 44). (Government objection to the testimony was sustained when the court ascertained the defendant did not know the identity of the calling party. A. 44).

He then testified a truck came in about 2:30 A.M. on Sunday, April 30, 1961. He did not know who they were. (He was not permitted by the court to testify what they told him. A. 45). An hour or so later the men brought another trailer to the farm and put it in the barn. (The court sustained a government objection to what the driver said unless he could be identified. A. 45). A few minutes after the second trailer was brought in a Pontiac car arrived carrying five men, one of whom alighted and identified himself as "Brownie" (A. 45). (Government objection to what "Brownie" said to the witness was sustained. A. 45). The men were in and about the farm for about two and one-half hours, when four of them left, leaving one man behind (A. 45-46). His statement that he "was told never to go into the barn . . . " was objected to and the objection was sustained (A. 46).

Offer of Proof

Calzavara then made an offer of proof outside the presence of the jury. In that offer, Calzavara testified that he was called on the telephone on April 30 and was told by the person on the phone that "Pete" said that some one had told him he could go to the farm if he broke down. On the first arrival of the tractor, there were two men. One was left behind when the driver went after another trailer. After the tractor left, five men came on to the farm in a Pontiac. When they pulled in they made him turn out the yard light (A. 46-57). The court asked the defendant if he were taking orders from the men and Calzavara replied he was threatened; the minute the men came in they told him that if he did not do as he was told and keep the trucks there for two or three days, "that he had better learn to swim with cement boots on" (A. 47). He was told that several times later, including one time over the telephone after the trucks and the merchandise had been moved out (A. 47).

When the Pontiac arrived, the man who said his name was Brownie told the witness that as long as he was a good boy and behaved, nothing would happen to him (A. 47). When Brownie had this conversation with him, Brownie shook a gun at the witness (A. 48). At about 11:00 P.M. on Monday, May 1, some of the men told him they were going to take his tractor; he told them not to, but one of them said they were going to take his tractor whether he liked it or not and told him that "he had better behave if he knew what was good for him" (A. 48). He received a phone call later and was told the tractor was broken down and that it would be returned later; but that if it was not returned, that he should move the merchandise that the men had left behind in the barn "and to take care of himself, and to keep his mouth shut, because they knew where his child went to school" (A. 48).

On cross examination, Calzavara testified he could not recognize any of the seven men who came to his farm. The co-defendants in the courtroom could be the same men, but he could not know (A. 49). On further cross examination, he testified that when FBI agents McCormick and White visited him, they showed him such pictures, one of which was Government Exhibit B. He said that agent McCormick told him the man on the picture was the one posing as Brownie. For the Record, the prosecutor stated the picture was one of Peter Gushi (A. 49).

On further cross examination he testified that when he appeared before the Milwaukee Grand Jury he was shown many pictures but did not remember identifying Exhibit C, co-defendant Daddino's picture. Asked if he had not been asked certain questions and given certain answers before the Milwaukee Grand Jury, in which answers he had testified that a photograph shown to him was a photograph of one of the men who had come with the trailers, he testified he did not remember the questions and did not remember ever identifying anybody (A. 50). Asked by the prosecutor if he remembered telling the Grand Jury in Milwaukee that he was going to get $500 he replied that he was told after the Pontiac pulled in that if he was a good boy they would take care of him and give him $500 (A. 50-51).

He testified he did not tell the FBI that he had been threatened by the men when the FBI first talked to him; but he told the FBI about it later. He told the FBI that he and his family were threatened, but did not recall whether he told the FBI about the display of a weapon (A. 51).

Mr. Robert Bailey, the prosecutor, identified a picture shown to Calzavara before the Milwaukee Grand Jury as a picture of co-defendant Daddino and advised the court

the transcript stated that the picture was shown to Calzavara before the Grand Jury and Calzavara then said he could identify it (A. 52). Calzavara stated he remembered being shown many pictures before the Grand Jury, but did not remember identifying anyone (A. 52).

The court then ruled that Calzavara could not testify to conversations with unidentified persons because the rules of evidence required a basis for corroboration of conversations, which was the reason for the "dead man statute" because the dead man wasn't available to affirm or deny the conversation (A. 52).

The court told Calzavara he was not to testify before the jury to conversations with unknown persons (A. 52).

Evidence Resumed

In the presence of the jury, Calzavara testified the trucks were in the barn on his farm from Sunday morning until Tuesday morning during which period he only went far enough into the barn to feed the dog. He did not see any of the trailer contents until the trucks left, nor did he ever know the trucks' destination (A. 52-53).

A State Senator, Walter P. Hoffelder, a deputy chief of the Elgin Illinois Fire Department, Gerald Ahrens, a machine operator for the I.C. Railroad and a horse-owner Leroy Daily, a farm manager in Gurnee, Illinois, Richard Peterson, a Veronica Severs, a riding stable operator of Libertyville, Illinois, a Joseph Robinson and a farmer of Round Lake, Illinois Archie Rosing, all testified that Calzavara's reputation for truth and honesty was good (A. 58-59).

Government Evidence on Rebuttal

FBI agent White testified on rebuttal that he talked to Calzavara on May 12, 1961, and Calzavara described the features of some of the men who had come on to his farm, that they were wearing dark glasses, hats and gave a description as to approximate age and height (A. 61).

On cross examination agent White stated that Calzavara told him threats had been made and that Calzavara had been told, "You don't know nothing, and if anyone asks you anything, you better not say anything unless you can swim with your feet in cement." (A. 62).

Testimony on Defendant's Motion to Suppress the Evidence as to Him

Asst. U. S. Attorney Matthew Corry, of Milwaukee, testified Calzavara appeared in his office pursuant to a Grand Jury subpoena; that he did not give Calzavara any constitutional warning; and that he did not advise that Calzavara was entitled to have an attorney present. When Calzavara was temporarily excused by the Grand Jury, he was told to remain on the premises. Then FBI agents interrogated Calzavara and obtained information from him that he had transported $12,000 worth of cigarettes to his brother's farm. The government had no such knowledge before the interrogation (A. 23-24).

FBI Agent John Matthews testified he interrogated Calzavara in the office of the U. S. Attorney in Milwaukee when Calzavara appeared in response to a Grand Jury subpoena. Agent Matthews suggested that Calzavara was a "victim in this thing" (A. 25) and "we tried to make him believe he would be better off if he were cooperating

with the government" (A. 26). He further said Calzavara got the idea they would suggest leniency if he cooperated. And that the very fact that Calzavara told them was tantamount to cooperation (A. 26).

The Separation of the Jury

In the midst of its deliberations, the jury were directed to separate to their homes, then to return the next day to resume their deliberations. Petitioner objected to that procedure, but his objection was overruled. (Supplemental Appendix,[1] p. 7)

The opinion of the Court of Appeals states that Petitioner is "in no position to claim error in this connection" because his counsel "agreed to the procedure." The opinion is not supported by the record in that aspect.

---

[1] In Calzavara's Reply Brief.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. The misuse of the grand jury and the wrongful reception of evidence.

Petitioner, enjoying the benefits of a third-grade education, was called before the Grand Jury investigating the offense here charged. He testified. The government contends that he was not then a putative defendant, and that no criminal action against him was contemplated until after his testimony.

In the course of his compulsory appearance before the Grand Jury, during a recess when he was under orders to remain, he was questioned by F.B.I. agents who determined from him that he had taken stolen merchandise to his brother's farm. The government did not previously possess this information (A. 23-24). The merchandise was recovered and introduced against Petitioner over his motion to suppress.

The circumstances of petitioner's appearance before the Grand Jury are discussed in *U.S.* v. *DeGrazia et al.*, 213 F. Supp. 232, Appendix C. Viewed in the light of the government testimony on the motion to suppress, the government contention that Petitioner was then just another witness has an exceptionally hollow ring. When petitioner appeared in response to the subpoena, he was interrogated by an F.B.I. agent who "tried to make him believe he would be better off if he were cooperating with the government." The agent also admitted that Petitioner then got the idea that the agents would suggest leniency if he cooperated; and Petitioner thereupon "cooperated". (A. 26)

The resulting indictment, of course, was dismissed. But it made no difference to the government for the procedure it adopted was simplicity itself. It merely obtained a new indictment, making the same charges against Petitioner a second time.

Petitioner moved to dismiss the new indictment. But this time the government was prepared. It filed the handy, stereotyped affidavit which, as the Court of Appeals notes, "unequivocally stated that no testimony was wrongfully, unlawfully or illegally obtained from Calzavara at any time." And this, according to the courts below, was conclusive—notwithstanding that the trial court had found, only a few months prior, that testimony had been wrongfully, unlawfully and illegally obtained from Calzavara.

In short, the government's *ex parte* and conclusory affidavit served effectively as a mandate to reverse the findings of the trial court.

The result is nonsense. Obviously, testimony was wrongfully obtained from Petitioner. The government might not have felt that its acts were wrongful, but the trial court reached the opposite conclusion from its original consideration of the matter (*U.S.* v. *DeGrazia*, Appendix C); and in theory, it is the opinion of the courts, rather than that of the government, which should be determinative in such a situation.

But the government disagreed with the trial court. Therefore, it was in a position to file a pleading, the second time around, stating that the prosecution had done nothing wrong. Thereupon, the matter was closed. The government's statement was regarded as conclusive, both in the trial court the second time and on appeal. By inference, both the trial court and the Court of Appeals have

held that the first time around, the trial court suffered from errors from which it was rescued by the timely statement by the government of a contrary conclusion.

This anomalous situation is said to be the consequence of your Honors' decision in *Lawn* v. *United States*, 355 U.S. 339, 348-350. *Lawn* might be viewed as justification of the result below, if the government had filed an affidavit that no evidence unlawfully produced through the appearance of petitioner before the first grand jury, had been used before the second grand jury. But that was not the case. The government did not deny that the illegal evidence had been *used* before the second grand jury. Rather, the government denied that any illegally obtained evidence *existed*. (A. 7) And the only reason that assertion did not constitute wilful perjury, was that it represented a conclusion rather than a statement of fact. Yet, it served to foreclose any inquiry by petitioner, and to immunize the government against the consequences of its abuse of the process of the first grand jury.

But it is in the realm of the use of the unlawful evidence at the trial, that all contact with logic becomes irretrievably lost. For at the trial, the government was permitted to make use of the very unlawfully obtained evidence which it had averred not to exist, and which the court had earlier determined to have been unlawfully obtained.

On cross examination on his offer of proof, the defendant was cross examined by the government extensively from the transcript of his grand jury appearance (A. 49-52). *Petitioner's* testimony was excluded in part because the government had unlawfully obtained evidence from petitioner! (A. 52).

Evidence unlawfully obtained, as was the transcript of petitioner's grand jury appearance, may no more be used for impeachment than in chief; for justice generally re-

quires that the defendant occupy the same position he would have held if his rights had been respected. *Walder* v. *United States,* 347 U.S. 62, 65; *Johnson* v. *United States,* D.C. Cir. 1964, 344 F. 2d 163, 164-165.

The Court of Appeals would justify the result below on the theory that the trial court found, in quashing petitioner's first indictment, "that no direct incriminating statements of fact were made by him." But that is completely immaterial to the issue. *Jones* v. *United States,* D.C. Cir. 1964, 342 F. 2d 863, 868. He may not have made a *confession* before the grand jury, but he certainly furnished evidence ultimately used against himself. And the Fifth Amendment forbids the extortion of all evidence, not merely confessions.

In the aspect of the admission of the physical evidence, the result is almost Rabelaisian. Petitioner moved to suppress the evidence on the grounds that it constituted the product of his compulsory appearance before the grand jury. Not so, replied the government: the evidence was obtained, not through abuse of the grand jury process, but through a promise of lenity. (A. 26) Therefore, the evidence was admitted. For it had been obtained, not when Petitioner was testifying, but during an interruption in his testimony during which he was told to remain and was there interrogated by the F.B.I. (A. 24). Therefore, in the view of the lower courts, the grand jury appearance had nothing to do with the obtaining of the information. And as to the promise of lenity, that doesn't count, for the defendant's motion had as its thrust the misuse of the compulsion of the grand jury process.

The whole thing has to be seen to be believed.

We do not contend that misuse of grand jury process immunized from prosecution the perpetrators of any offense then under consideration. Such a proposition would

be almost as illogical as those employed below to sustain Petitioner's conviction. But we do contend that where it has been demonstrated that an indictment is the product of wrongful compulsion of a defendant's testimony before a grand jury, the evidence thus obtained cannot be used before a subsequent grand jury. And certainly it cannot be used at the trial.

Lawn v. *United States, supra,* 355 U.S. 339, is completely inapposite to this situation. In *Lawn,* the government made no use before the second grand jury of the evidence illegally obtained before the first grand jury. In this case, the government proceeded on the theory that all of its evidence had been lawfully obtained: in effect, a second indictment was obtained on the theory that the evidence had been lawfully obtained in the course of the first grand jury proceedings. Obviously, in these circumstances, some sort of hearing was required, to assure that the second indictment was not the product of the procedures which had caused the first indictment to be quashed. *Jones* v. *United States,* D.C. Cir. 1964, 342 F. 2d 863, 873.

And in any event, *Lawn* specifically states that its holding is not to be deemed license for the use of such evidence at the trial, as was done here. 355 U.S. 350.

There is simply no logical theory on which the result below can be justified. It is blindingly clear that the evidence against Petitioner is the product of compelling his testimony before the grand jury, without admonition of any kind and without knowledge of his right to counsel. Petitioner's third-grade education and his lack of any prior contact with the courts, contributed to a situation in which the Fifth Amendment was rendered totally meaningless.

II. The exclusion of petitioner's testimony relative to compulsion.

Petitioner contended that his acts had been performed under compulsion and threats. But he was unable to identify the persons making the threats. For that reason, he was not permitted to offer the testimony (A. 52). The Court of Appeals affirmed because the statements were "self-serving".

It seems improbable that testimony of a criminal defendant can ever be excluded with propriety on the grounds that it is self-serving. All testimony of criminal defendants is self-serving in that sense. It is Hornbook law that exclusion of self-serving statements relates to declarations out of court, not subject to cross examination.

It is to be noted that the prosecution witnesses were permitted, on the government's direct examination, to testify to threats made by persons they could not identify (A. 14).

To forbid a defendant from testifying to threats against him, as was done here, may have the advantage of making convictions easier to obtain. But it also has the disadvantage of making convictions *too* easy to obtain. Every bank messenger who is robbed by an unidentified person, becomes an embezzler as a matter of law; for his lips are sealed when he is brought to trial.

The Court of Appeals goes farther, and states that petitioner's testimony could not establish compulsion as a matter of law. That argument overlooks the following propositions:

A. Petitioner was charged with *conspiracy*. On that theory, he was held accountable for the acts of others on a concept of vicarious liability. Obviously, if his participation was the product of

his fear in consequence of threats directed against him, he certainly cannot be said to have conspired with anyone, even if the threat would not be sufficiently immediate to excuse his personal felonies, if any.

B. Petitioner's child was constantly vulnerable to the threats of the unidentified men (A. 48). Not knowing who they were, petitioner had no reasonable chance to cause the apprehension of all of them. His fears for the safety of his child were quite reasonable.

C. The extent to which petitioner might reasonably have been motivated by the threats, was a jury question. Petitioner was given no chance to tell his story to the jury. To say that a jury would not have been "warranted" in finding coercion, is singularly easy when the jury has been prevented from hearing the evidence. And the jury's inquiry would have been whether petitioner's acts had been proven to be voluntary beyond reasonable doubt and not to make a "finding" of coercion. *United States* v. *Carrier*, 4 Cir. 1965, 344 F.2d 42, 46.

The fundamentals of due process are notice, opportunity to be heard, and a finding based on the record. Petitioner has been denied at least one, and probably two of these elements through being denied the opportunity to tell his story to the jury.

III. The separation of the jury during its deliberations.

In the Seventh Circuit, a jury may not properly separate to its homes during its deliberations, and then resume its deliberations, if the defendant objects to the separation. *United States* v. *D'Antonio*, 7 Cir., 1965, 342 F. 2d 667.

And that is precisely what was done in the trial below. (Supplemental Appendix,[2] p. 7)

The Court of Appeals' opinion states that Petitioner is barred from this assignment of error because his attorney consented to the separation of the jury. (Appendix A, p. 2)

There is no basis for such a holding. The record will show no such agreement. Defense counsel in fact objected, unequivocally, to the separation.

The record shows clearly that the trial court announced that it proposed to let the jurors deliberate until 10:30 P.M., then return to their homes and resume deliberations the next day. Defense counsel then spoke as follows:

> "I would have no objection, if your Honor please, if your Honor came back at 10:30, 10:40, whatever the hour might be, to then agreeing upon a sealed verdict which would be signed, sealed and delivered on Monday morning, but *I would have an objection to the jury separating.*"
>
> The Court: "This is standard practice, Mr. Callaghan and I am going to do it." (Supp. App.[3] 7, Supp. Tr. 7)

Most assuredly, this is not an agreement by petitioner, but an objection. And the ominous thing about the opinion of the Court of Appeals, in that aspect, is that the processes of this Court can easily be circumvented in any case by a misstatement of that nature.

In view of the holding in *D'Antonio*, there is no necessity for Petitioner to argue that it is error to permit the jury to separate during its deliberations over his objection.

---

[2] In Calzavara's Reply Brief.

[3] In Calzavara's Reply Brief.

But Petitioner urges vigorously, that he has been denied due process in the Court of Appeals itself. As previously observed, one of the elements of due process is a determination based on the record. Petitioner certainly has not had that. Petitioner has instead been victimized by a flat misstatement of the record.

This contention is not made lightly. But Petitioner is entitled to due process on appeal, fully as much as at the trial. Whatever may have caused the Court of Appeals to state that petitioner agreed to the separation of the jury, constituted a force, influence and factor which denied such due process to petitioner.

Petitioner has pointed out this error by Petition for Rehearing in the Court of Appeals, but without effect. He prays that your Honors may hear him.

CONCLUSION.

Petitioner has been heard only at the will of the prosecution. He has furnished, under unlawful compulsion, the evidence which convicted him. He has been denied the right to make his explanation to the jury. And in the Court of Appeals itself, he has not been heard; the ascribing to him of an agreement that he never made, is ample demonstration of that.

If his right to be heard is ever to be respected, it must, we fear, be now. We pray that your Honors will grant certiorari.

Respectfully submitted,

GEORGE F. CALLAGHAN,
Attorney for Petitioner